

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0026**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 122827). The employer filed a timely request for hearing. On October 12, 2015, ALJ Murdock conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46006, concluding the employer discharged claimant for misconduct. On October 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On December 1, 2015, EAB issued Appeals Board Decision 2015-EAB-1282, reversing Hearing Decision 15-UI-46006 for additional proceedings. On December 15, 2015, ALJ Murdock conducted a hearing, and on December 17, 2015 issued Hearing Decision 15-UI-49636, again concluding that claimant's discharge was for misconduct. On January 6, 2015, claimant filed an application for review with EAB.

EAB considered the entire hearing record and claimant's written argument to the extent it was based on information received into evidence at the hearings. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). No party applied for review of that portion of Hearing Decision 15-UI-49636 concluding the employer discharged claimant. EAB therefore limited its review to whether claimant's discharge was for misconduct.

**FINDINGS OF FACT:** (1) Ashland Supportive Housing employed claimant from November 1, 2005 to July 3, 2015.

(2) The employer was a private non-profit corporation providing housing and support services for adults with developmental disabilities. Claimant worked for the employer as a residential manager of the employer's home for adults with developmental disabilities. As such, she was legally required to maintain the ability to pass a criminal background check by the State of Oregon.

(3) On December 2, 2014, claimant drove her personal vehicle after consuming more than two alcoholic beverages after work. Claimant was stopped by law enforcement and failed a breathalyzer test for alcohol. She was arrested, charged with driving under the influence of an intoxicant (DUII) and reckless

driving, and incarcerated overnight. Claimant was later convicted of DUII, which was her second conviction for driving under the influence of alcohol.

(4) In January 2015, claimant failed a criminal background check conducted by the State of Oregon due to her conviction for DUII. Claimant attempted to appeal the failure of the criminal background check. The employer created a temporary part-time office position for claimant, for which passing a criminal background check was not required, and allowed her to continue working in that position while her appeal was pending. Claimant eventually dropped her appeal of the failed criminal background check after determining that it would not succeed. The employer allowed claimant to continue working until it eliminated the part-time office position due to the anticipated hiring of an office manager, for which passing a criminal background check was required.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c). OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In written argument, as at hearing, claimant essentially asserts that the employer demoted her to a part-time office position for failing the January 2015 criminal background check, and laid her off from that position due to a lack of work, and not misconduct. However, the record shows the part-time office position was a temporary position the employer created to allow claimant to continue working while she appealed her failure of the criminal background check. The employer allowed claimant to continue working for a limited period of time after she dropped her appeal, until it eliminated the position due to the anticipated hiring of an office manager, for which passing a criminal background check was required. However, the employer would have allowed claimant continue working indefinitely if she had not failed the criminal background check, or if her appeal had been successful. We therefore focus on claimant's failure of the criminal background check as the proximate cause of her discharge.

The employer had a right to expect claimant to maintain the ability to pass a criminal background check by the State of Oregon, which was necessary to the performance of her occupation as a residential manager of a home for adults with developmental disabilities. On December 2, 2015, claimant drove her vehicle under the influence of more than two alcoholic beverages, with a blood alcohol content of 0.08 percent or more. Claimant should have known her conduct would probably result in her conviction

for DUII<sup>1</sup> and resulting failure to pass a criminal background check by the State of Oregon. Her conscious decision to drive her vehicle under the influence of more than two alcoholic beverages demonstrated indifference to the consequences of her actions. Claimant's failure to maintain the authority necessary to the performance of her occupation therefore was wantonly negligent, and reasonably attributable to her. The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-49636 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: February 1, 2016**

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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<sup>1</sup> *See* ORS 813.010(1) (A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person has 0.08 percent or more by weight of alcohol in the blood of the person, or the person is under the influence of intoxicating liquor).